

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Debra Sue Callies, ) No. 00-CV-0708-PHX-PGR  
Plaintiff, ) ORDER  
vs. )  
United States, )  
Defendant. )

This is an action seeking recovery of damages related to the wrongful disclosure of information by the Internal Revenue Service (IRS). Pending before this Court are: (1) the IRS's Motion for Summary Judgment (Doc. 118) and (2) plaintiffs' Motion for Summary Judgment (Doc. 121).

**Background**

During the month of September, 1999, Mr. Wewee, a Certified Public Accountant in Tucson, Arizona, began to submit requests to the IRS for transcripts of tax return information related to his clients. Mr. Wewee had proper authorization from his clients to request the information and wished to receive it to prevent any problems which might have resulted from "Y2K" computer failures at the IRS.

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1 In response to Mr. Wewee's request for tax return  
2 transcripts relating to approximately 33 of his clients, the IRS  
3 provided printouts of transcripts to him containing tax return  
4 information related to those 33 clients as well as tax return  
5 information related to persons who are not (and were not) his  
6 clients. Mr. Wewee had no authority to receive tax return  
7 transcripts for individuals who were not his clients and, in some  
8 cases, only had limited authority to receive specific transcripts  
9 related to specified tax years' returns of his clients.

10 During the period from October 12, 1999 through February 2,  
11 2000, Mr. Wewee received transcripts which he was not authorized  
12 to receive which related to 1,391 individuals and encompassed  
13 2,862 tax years.

14 Representative plaintiffs are individuals who did not  
15 provide authority for Mr. Wewee to request or receive their tax  
16 return transcripts from the IRS, but whose tax return transcripts  
17 were nevertheless provided without request. There are 1,391  
18 individuals whose transcripts were so provided to Mr. Wewee.

19 **Procedural History**

20 The Complaint in this matter was filed on April 19, 2000.  
21 It alleged one Count, improper disclosure of tax information in  
22 violation of 26 U.S.C. § 6103 and § 7431. At the time the  
23 Complaint was filed, Plaintiffs sought actual damages to be  
24 proved at trial, including punitive damages. The IRS answered  
25 the Complaint on July 7, 2000, admitting that the disclosures to  
26 Wewee were unauthorized, but denying that the plaintiffs  
27 suffered actual compensatory damages as a result of the  
28 disclosures, and denying that its conduct was "willful or the

1 result of gross negligence." The IRS further admitted that the  
2 plaintiff's were entitled to the statutory damages of \$1,000.00  
3 per person whose tax return information was wrongfully disclosed,  
4 reduced by the amount paid to any such individual in his or her  
5 administrative claim for damages. The representative plaintiffs  
6 have stipulated that they "did not suffer actual damages, as the  
7 term is used in 26 U.S.C. § 7431(c), as a result of the actions  
8 alleged in paragraphs 12-16 of the complaint."

9 **Discussion**

10 Summary judgment should be granted pursuant to Federal Rule  
11 of Civil Procedure 56 only if no genuine issues of material fact  
12 exist and the moving party is entitled to judgment as a matter of  
13 law. See *Celotex Corp. v. Catreat*, 477 U.S. 317, 322 (1986). In  
14 ruling upon a motion for summary judgment, the court must view  
15 the evidence in the light most favorable to the nonmoving party.  
16 See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
17 574, 587 (1986).

18 **A. The IRS's Motion for Summary Judgment**

19 The IRS asserts two arguments in favor of summary judgment.  
20 First, that punitive damages are not awardable without actual  
21 damages. Second, and alternatively, that any award of punitive  
22 damages will necessarily be excessive.

23 In any action brought under subsection  
24 (a), upon a finding of liability on the  
25 part of the defendant, the defendant  
shall be liable to the plaintiff in an  
amount equal to the sum of -

- 26 (1) the greater of -  
27 (A) \$1,000.00 for each act of  
28 unauthorized inspection or  
disclosure of a return or return  
information with respect to which  
such defendant is found liable, or

1 (B) the sum of -  
2 (i) the actual damages  
3 sustained by the plaintiff as a  
4 result of such unauthorized  
5 inspection or disclosure, **plus**  
6 (ii) in the case of a willful  
inspection or disclosure or an  
inspection of disclosure which  
is the result of gross  
negligence, punitive damages,  
**plus....**

7 26 U.S.C. § 7431(c) (emphasis added). The IRS argues that because  
8 plaintiffs have stipulated that they have not suffered any actual  
9 damages, they are necessarily prevented from collecting any  
10 punitive damages.

11 This Court's interpretation of § 7431 is consistent with the  
12 IRS's position. There is no Ninth Circuit law on point, but the  
13 matter has been addressed in other Courts and there is Arizona  
14 authority related to punitive damages.

15 "The clear statutory language of section 7431(c) precludes  
16 the award of punitive damages in a case in which actual damages  
17 have not been shown." See *Barrett v. United States*, 917 F.Supp.  
18 493, 504 (S.D. Tex. 1995). The Barret court reasoned that the  
19 very language and structure of the statute, the coupling of  
20 actual and punitive damages under subpart (1)(B) and the failure  
21 of the statutory damages provision in subpart (1)(A) to mention  
22 punitive damages, would logically mean that punitive damages are  
23 recoverable only when actual damages have been proved. See *id*;  
24 see also *Smith v. United States*, 740 F.Supp. 948, 955 (C.D. Ill.  
25 1990), *rev's on other grounds*, 964 F.2d 630 (7<sup>th</sup> Cir. 1992).

26 The aforementioned interpretation of the statute is  
27 consistent with the Arizona common law tort rule that punitive  
28 damages may not be awarded in the absence of actual damages. See

1    *Saucedo v. Salvation Army*, 24 P.3d 1274, 1280-81 (2001) ("This is  
2    precisely why our common law mandates that a plaintiff suffer  
3    actual damages as a result of the underlying tort before a claim  
4    of punitive damages can be entertained"); see also *Wyatt v.*  
5    *Wehmueeller*, 167 Ariz. 281, 285 (1991) (a plaintiff must be  
6    entitled to actual damages before being entitled to punitive  
7    damages); *Hyatt Regency Phoenix Hotel Company v. Winston &*  
8    *Strawn*, 184 Ariz. 120, 131 (1995).

9        Plaintiffs rely on the Fourth Circuit decision in *Mallas v.*  
10    *United States* for the proposition that punitive damages may be  
11    awarded even if actual damages are not proven. 993 F.2d 1111,  
12    1126 (4<sup>th</sup> Cir. 1993). "[A] taxpayer may recover punitive  
13    damages, even where his actual damages are zero..." *Id.*  
14    However, plaintiff's reliance on *Mallas* is misplaced because it  
15    is contrary to the well established principles of Arizona law set  
16    forth above.

17        Moreover, plaintiffs claim that Arizona adopted the *Mallas*  
18    decision in *Aloe Vera of America v. United States*. 128 F.Supp.2d  
19    1235, 1247 (D.Ariz. 2000). This representation is somewhat  
20    inaccurate. While it is true that *Aloe Vera* does reference  
21    *Mallas*, it is unrelated to the issue of applying punitive damages  
22    where no actual damages are present. See *id.* In *Aloe Vera* the  
23    Court, referring to *Mallas* stated, "[t]he Fourth Circuit held  
24    that the information disclosed to plaintiffs' investors was false  
25    information and that such false information constituted tax  
26    return information within the meaning of the statute. The  
27    Government argued that the letters to plaintiffs' investors were  
28    not tax return information. The Fourth Circuit disagreed." *Id.*

1 While the IRS's alternative argument is well-taken, with  
2 respect to punitive damages necessarily being excessive, in the  
3 interest of judicial economy this Court need not reach the  
4 merits .

5 **B. Plaintiff's Motion for Summary Judgment**

6 As a threshold matter, it appears that plaintiff now seeks  
7 to amend the Complaint via Motion for Summary Judgment by arguing  
8 that statutory damages should be permitted and that they be set  
9 at \$3,000.00 for each class member due to three alleged wrongful  
10 disclosures.<sup>1</sup>

11 According to plaintiffs, the first unlawful disclosure  
12 occurred when the Ogden, Utah IRS Service Center disclosed the  
13 retention registers to Shirley Turner, an IRS employee. The  
14 second occurred when Shirley Turner inspected the retention  
15 registers provided by the Ogden Service Center. The third  
16 occurred when Shirley Turner turned the retention registers over  
17 to Mr. Weewee.

18 The IRS argues that there was only one wrongful disclosure  
19 and it occurred when Shirley Turner provided the records to Mr.  
20 Weewee. This Court concurs with the IRS's position in this  
21 regard.

22 Most importantly, the Complaint does not plead any facts  
23 which would justify finding three wrongful disclosures. In the  
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25 <sup>1</sup> Arguably, the plaintiffs should be precluded from receiving even  
26 statutory damages given that they were not pled in the Complaint. Even though  
27 plaintiffs could not have recovered both actual and statutory damages under §  
28 7431, a plaintiff is permitted to pled alternative forms of relief. Fed.R.Civ.P.  
8(e)(2). Nonetheless, because the IRS has admitted wrongdoing in the Answer and  
other pleadings, and most significantly, seeks judgment in the amount of  
statutory damages, this Court will consider imposition of statutory damages.

1 general allegations and in the only claim for relief, the  
2 plaintiffs merely refer to Shirley Turner's disclosure of the tax  
3 information to Mr. Weewee. "The IRS's improper and unauthorized  
4 disclosure to Mr. Weewee of tax return transcripts...violated 26  
5 U.S.C. §§ 6103 and 7431." There is no mention of an alleged  
6 improper disclosure of information to Shirley Turner or her  
7 subsequent inspection of the documents.

8 Moreover, the Complaint does not request statutory damages  
9 as a prayer for relief let alone a request to have them  
10 multiplied three times. Instead, plaintiffs specified actual  
11 damages and punitive damages. "...[E]ach plaintiff suffered  
12 actual damages in a sum to be proved at trial...." "The IRS's  
13 improper and unauthorized disclosure...was willful...Therefore,  
14 plaintiffs are entitled to an award of punitive damages."

15 The remainder of plaintiffs' Motion for Summary Judgment  
16 argues for the imposition of punitive damages citing to various  
17 facts to support the alleged willful and grossly negligent  
18 conduct of Shirley Turner. The Court need not reach the merits  
19 in this regard. First, as indicated above, plaintiff's are not  
20 eligible for punitive damages where there are no actual damages  
21 suffered. Second, assuming in arguendo that plaintiffs would be  
22 permitted to recover punitive damages, the amount of said damages  
23 is clearly a question of fact to be addressed by the jury.

24 **C. Fraijo & Caster's opposition to the IRS's Motion for**  
25 **Summary Judgment.**

26 On October 4, 2001, this Court, after a lengthy and detailed  
27 explanation, ordered the removal of plaintiff's Caster and Fraijo  
28 as class representatives. The Order also removed Edmund Kahn as

1 class counsel. At the time they were removed as class  
2 representatives Caster and Fraijo had the opportunity to bring  
3 their own independent action outside the class, represented by  
4 counsel of their choosing or become general class members  
5 represented by Norris Ganson. It appears they chose the latter.  
6 Nonetheless, Mr. Kahn, on behalf of Caster and Fraijo filed an  
7 "Opposition to defendant's Motion for Summary Judgment." As  
8 general class members represented by Mr. Ganson, any documents  
9 filed by Mr. Kahn on behalf of Caster and Fraijo are  
10 inappropriate. Similarly, in the event they chose to proceed  
11 outside of the class, represented by Mr. Kahn, any involvement in  
12 this particular litigation would be inappropriate.

13 Accordingly, the opposition will be stricken from the  
14 record. Moreover, Mr. Kuhn is advised, for a second time, that  
15 he is not class counsel and thus not permitted to participate in  
16 this litigation.

17 Based on the foregoing,

18 IT IS ORDERED that defendant IRS's Motion for Summary  
19 Judgment (Doc. 118) is GRANTED.

20 IT IS FURTHER ORDERED that because this Order disposes of  
21 all remaining issues, the Clerk of Court is to enter judgment in  
22 the amount of statutory damages provided in 26 U.S.C. §  
23 7431(c)(1)(A), less the amounts already paid by the United States  
24 to such plaintiffs.

25 IT IS FURTHER ORDERED that plaintiffs' Motion for Summary  
26 Judgment (Doc. 121) is DENIED.

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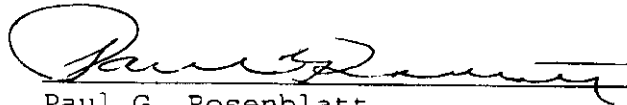
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1 IT IS FURTHER ORDERED that the Clerk of Court is to strike  
2 from the record the Opposition to Motion for Summary Judgment  
3 filed by attorney Edmund Kahn (Doc. 127).

4 IT IS FURTHER ORDERED that the Clerk of Court is to supply  
5 Edmund Kahn with a copy of this Order but thereafter to remove  
6 him as an attorney of record in this matter.

7  
8 DATED this 24<sup>th</sup> day of January, 2002.

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11 Paul G. Rosenblatt  
12 United States District Judge  
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